

Burma Lawyers' Council
The current state of the judiciary in Myanmar
April 2012

In March 2012 the UN Human Rights Council (HRC) concluding its 19th session issued a new (draft) Resolution on the situation of human rights in Myanmar. Concerning the judiciary the HRC:

Calls upon the Government of Myanmar to ensure the independence and impartiality of the judiciary and the independence of lawyers, and to guarantee due process of law¹

The Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, in his “Progress report” which he presented to the HRC during the 19th session, recommended to Myanmar that:

Greater attention be paid to judicial reform and the capacity-building and training of judges and lawyers to address continuing concerns regarding the independence, impartiality and effectiveness of the judiciary; and technical assistance be sought from the international community, particularly from OHCHR and other organizations²

The BLC supports the above statements and recommendations by the Human Rights Council and Special Rapporteur and wants to give some more in depth information on five issues concerning the judiciary in Myanmar: i) Independence and impartiality of the judiciary; ii) Military justice and court martial; iii) Access to the judiciary; iv) Corruption in the judiciary; and v) Ability for lawyers to defend clients.

i) Independence and impartiality of the judiciary

Under Section 299 of the 2008 Constitution the Chief Justice and other Supreme Court Judges are nominated by the President, who will submit the nominations to the Pyidaungsu Hluttaw for approval. The Pyidaungsu Hluttaw “shall have no right to refuse the person nominated by the President [...] unless it can clearly be proved that the persons do not meet the qualifications for the post prescribed in Section 301 [of the 2008 Constitution]”.

This section excessively limits the legislature’s ability to participate in the appointment of judges, effectively giving the President almost unrestricted power over the appointment process. In other democracies, the legislature sets its own standards as to when it will approve a judicial appointment. Under Section 299, however, it can only reject a candidate who clearly does not meet Section 301 qualifications, which are matters such as age, judicial experience, and loyalty to the government. There can be no consideration of qualities such as judicial philosophy, personal character, or ethical behavior. Furthermore, the burden is on the legislature to show clear evidence that the candidate does not have the Section 301 qualifications.

¹ UN Human Rights Council Draft Resolution 19/..., A/HRC/19/L.30, 20 March 2012, section 12.

² UN Special Rapporteur on the Situation of Human Rights in Myanmar, Progress report, A/HRC/19/67, 7 March 2012, para. 94(a).

Also it is easy to remove judges if they act against the will of the Government. The charges under which a judge can be impeached are subjective and vague, ranging from “misconduct” to “inefficient discharge of duties assigned by law.” Justices are also required to be “free from party politics,” raising the concern that any judge’s ruling against the Government would be labeled a ‘political’ decision. Under these vague standards, judges have no hope of tenure, and their every adverse decision could be punished by the Government. Both the Justices of the regular court system and the Justices of the Constitutional Tribunal, which acts as the final authority on matters of constitutional interpretation, are dependent on the Government for their continued job security.³

Thura U Aung Ko, chairman of the Pyithu Hluttaw Judicial and Legislative Committee told reporters on 29 December 2011 that “sections of the judiciary were biased as they still worked according to directives and verbal orders from superiors” and that “[w]hile the legislative and executive have started changing, the lower levels of the judiciary remain unchanged [and] [t]hey cannot follow into the democratic era”.⁴

ii) Military justice and court martial

Burma’s 2008 Constitution establishes a separate set of courts to adjudicate all crimes committed by the military. Many countries have court-martial systems to judge military offenses, but Burma’s court-martial system is notable for its broad jurisdiction and unrestricted power. Section 319 of the 2008 Constitution, says only that Courts-martial “shall adjudicate Defence Services personnel.” Under this unrestricted mandate, members of the military never have to appear before civilian courts, regardless of their crime. Article 294 of the Constitution declares that the Courts-martial fall outside the jurisdiction of the Supreme Court, so that the “highest court of the Union” actually has no power over the military justice system.⁵

Furthermore, Section 343(b) of the 2008 Constitution provides too much power over military justice to the Commander-in-Chief. It makes the Commander-in-Chief’s decisions over all legal matters involving the military “final and conclusive.” This section could be interpreted to give the Commander-in-Chief the power to overturn the rulings of court-martials. Under the Constitution, the Commander-in-Chief is not elected and not accountable to any higher authority.

iii) Access to the judiciary

In the past many demonstrators were imprisoned and summarily tried by military tribunals sidestepping regular courts. A lot of political activist were and are still imprisoned under sentences issued by these military tribunals. These prisoners should be released as they have not had access to the judiciary.

Legal reform in the form of amendments of laws and drafting of new laws is not enough. Legal reforms also entails establishing confidence in the judiciary, meaning that people should have faith in the courts that their rights will be ensured in a fair trial by a competent, impartial and independent court.

³ Burma Lawyers’ Council, *Revealing Burma’s System of Impunity: A brief for the Commission of Inquiry Campaign*, pp. 2-3.

⁴ Soe Than Lynn, “Judiciary holding back democracy”, *Myanmar Times*, Vol. 31, No. 609, 9-15 January 2012.

⁵ *Supra* n. 3, ‘Revealing Burma’s System of Impunity’, p. 3.

It also means that people, often of ethnic minorities, in conflict areas, whose rights are being violated by the military and others should be able to obtain access to and justice at the courts.

iv) Corruption in the judiciary

The Asian Legal Resource Centre (ALRC), a non-governmental organisation with general consultative status, in a written statement during the 13th session of the UN Human Rights Council that it

has learned of the profound level of corruption in the police and courts of Burma. Practically every step in an ordinary criminal case can be accompanied by payments of one kind or another, which have a profound effect on the already extraordinarily limited avenues that citizens have available to them for redress of wrongs. Payments occur to get a case registered, to get it lodged in court, to get it heard as scheduled, to receive copies of documents, to secure a conviction or acquittal, to get the case accepted on appeal, and so on.⁶

In this statement the ALRC stated that “[o]ne of the ways in which the institutionalization of corruption can be identified in Myanmar is through the standardization of its practices.” An example is given that “fairly standard amounts are paid for certain services, such as the 30 per cent commission from police-nominated lawyers back to the police, and fixed payments per time per person to deliver food to a detainee”. Another example is “appeal judges [receiving] payment[s] per annum for imposition or reduction of a sentence.” “The appellant in a case before the Supreme Court, the plaintiff, paid a judge the equivalent of USD 10,000 to get his opponent imprisoned for five years, calculated not as a lump sum but at the rate of USD2000/year of imprisonment”.⁷

A statement by Thura U Aung Ko, Chairman of the Pyithu Hluttaw Judicial and Legislative Committee, confirms that corruption and a lack of transparency are serious issues and that his committee drafted a law to allow legal action against corrupt judges that would be submitted during the parliamentary session that has begun on 26 January 2012.⁸ There is no further information on the status of this law.

v) Ability for lawyers to defend clients

In 2009, the Special Rapporteur on the situation of human rights in Myanmar stated that he

regrets that the independence of lawyers to practice their profession is hindered for political motivation. Moreover, those who abide by integrity and principle are often charged under the Contempt of Courts Act (1926), which does not specify what actually constitutes contempt of court, leaving it open for any interpretation and decision by higher courts. Even after serving the unfair imprisonment, the career of many of these lawyers is destroyed, since their license is revoked and they cannot find any other job elsewhere.⁹

⁶ Asian Legal Resource Centre, MYANMAR/BURMA: Effects of endemic corruption in Myanmar's courts on rights of citizens, 25 February 2010, ALRC-CWS-13-08-2010.

⁷ *Ibid.*

⁸ *Supra* n. 3, “Judiciary holding back democracy”.

⁹ UN Special Rapporteur on the Situation of Human Rights in Myanmar, Report to the General Assembly, 24 August 2009, A/64/318, para. 36.

A US Department of State Country Report on Human Rights Practices 2010 published on 8 April 2011, stated for Burma that defendants in political cases were rarely given timely access to an attorney. The government is not obligated to provide an attorney at public expense, except in death penalty cases. Further the defendants and their attorneys were given access to government-held evidence relevant to their cases only after charges were made and when the case was put before the court.¹⁰

This US Department of State report further stated that:

Defense attorneys in criminal cases generally had 15 days to prepare for trial. However, courts often did not notify defense attorneys in political cases of the trial start date, leaving them little or no time to prepare. Even when lawyers of political activists were allowed the 15 days to prepare their clients' cases, they often were not allowed to present arguments on the day the case was tried in court. Instead, in some instances the court sentenced defendants immediately upon entering the courtroom, without arguments. Defense attorneys could call witnesses, cross-examine them, and examine evidence. However, their primary function was not to disprove a client's guilt, which was usually a foregone conclusion, but rather to bargain with the judge to obtain the shortest possible sentence for the client.¹¹

The Special Rapporteur on the situation of human rights in Myanmar, stated in his progress report published on 10 March 2010 following his February 2010 visit, that

many trials are conducted behind closed doors within prison compounds, without legal representation, without the presence or knowledge of their family members, without proof of evidence or with defective evidence, and pursuant to arbitrary decisions of the judges. [...] Defence lawyers face great difficulties ranging from not being informed of the dates and venues of the trials, to not being allowed to meet the detainees in private in advance of the trials.¹²

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¹⁰ United States Department of State (USSD), Country Report on Human Rights Practices 2010, Burma, 8 April 2011, p. 10, <<http://www.state.gov/g/drl/rls/hrrpt/2010/eap/154380.htm>>

¹¹ *Ibid*, p. 11.

¹² UN Special Rapporteur on the Situation of Human Rights in Myanmar, Progress report, 10 March 2010, A/HRC/13/48, paras 36 & 38.